

House Families, Children, and Seniors Committee  
Juvenile Competency Legislation (HB 4555, 4556)

Testimony Submitted by Michelle Weemhoff  
September 19, 2012

My name is Michelle Weemhoff and I am with the Michigan Council on Crime and Delinquency (MCCD), a non-partisan, non-profit organization dedicated to improving policies and systems aimed at reducing crime. The issue of juvenile competency has been a particular priority for us because it stems from the two foundational elements upon which the juvenile justice system was designed – upholding the Constitutional rights of our youngest citizens and providing guidance and rehabilitation for troubled youth.

Youth in Michigan have a right not to be prosecuted if they are incompetent, meaning that they cannot understand the charges against them or assist their attorney in their own defense.<sup>1</sup> A Michigan appellate decision, *in re Carey* (2000), specifically stated: “[I]n juvenile competency hearings, competency evaluations should be made in light of *juvenile*, rather than adult norms.”

The *Carey* decision held that, in the absence of statute for juvenile competency, Michigan’s adult standards should guide the proceedings (*MCL 330.2020, et seq*). Conventional standards for competency have typically focused only on the effects of mental illness or developmental disability on an individual’s ability to understand and participate in his/ her defense; yet emerging research and expert opinion indicate that a child’s ability to understand court proceedings may be compromised simply because they have not yet gained the types of reasoning abilities that normally develop throughout one’s teen years.<sup>2</sup>

**Unfortunately, current Michigan Law provides no guidance or consistency as to how courts should handle juvenile competency cases.** As a result, deeply troubled youth are lingering in detention, with staff who are unequipped to deal with very serious symptoms; courts are left with no answers and families are left with no options.

In May 2006, the Thomas Cooley Law School and the Michigan Department of Human Services (DHS) Juvenile Justice Workgroup sponsored a Symposium on Culpability and Competency of Juveniles, presenting material which examined how several other states have addressed these issues. At that time, MCCD convened a diverse workgroup of stakeholders to explore how standards could be applied in Michigan.

To assist with these recommendations, the workgroup reached out to Dr. Tom Grisso of the University of Massachusetts Medical School, Law and Psychiatry Program. Dr. Grisso is the national leading expert on juvenile competency and advisor to the MacArthur Foundation’s

<sup>1</sup> *Dusky v. United States*, 362 U.S. 402 (1960); *In re Carey* (2000).

<sup>2</sup> MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Issue Brief 1: Adolescent Legal Competence in Court.

Research Network on Adolescent Development and Juvenile Justice. Through a request from Senator Schuitmaker's office, Dr. Grisso provided a memo that outlines what the research tells us and how other states have used this research to develop similar legislation. This year, Dr. Grisso and his colleague, Dr. Larson, completed a guidebook, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*. Michigan's legislation closely follows the recommendations in this Guidebook. Specifically, the legislation addresses:

- *Definition for Juvenile Competency*: Juvenile competency is defined along the U.S. Supreme Court standard, *Dusky v. United States*, 362 U.S. 402 (1960), with consideration for the Michigan decision, *in re Carey* (2000), which acknowledges that juvenile competency should be made in light of age-appropriate norms.
- *Age of Presumed Incompetence*: A juvenile 10 years of age or older is presumed competent to proceed, unless the issue of competency is raised by a party. A juvenile less than 10 years of age is presumed incompetent to proceed, unless that presumption is challenged.
- *Qualifications for Examiners*: It is important to remember that the judge is the only one who can determine competency. A qualified forensic mental health examiner would be an expert witness called to provide a professional recommendation. This would include a psychiatrist or psychologist who possesses experience or training in ALL of the following: 1) forensic evaluation procedures for juveniles; 2) evaluation or treatment of children and adolescents with emotional disturbance, mental illness, or developmental disabilities; 3) clinical understanding of child and adolescent development; 4) familiarity with competency standards in this state.
  - *Forensic Evaluation Training* – The Michigan Department of Community Health shall review and endorse a training program, which will permit licensed social workers, licensed counselors and limited licensed psychologists, who have the requisite experience, to also become qualified forensic mental health examiners. I have submitted, for your review, a draft training outline, developed by Drs. Grisso and Larson.
- *Competency Report* - The evaluation shall be based on a juvenile adjudicative competence interview (JACI) or another interview method approved by the court.
- *Restoration*: If found incompetent, the court may attempt to stabilize or educate a child about the court process so that the youth can return to court to face their charges. *Note*: Restoration should not be confused with treatment.

Although the state does not gather statistics on the number of juvenile competency cases, we attempted to assess the scope of the issue by calling the twenty largest counties and asking how many youth were found incompetent in 2010. Among the largest counties, we found: in Wayne County, there were 12 youth found incompetent; in Oakland County, there were 15 youth;

Genesee County had 12 youth; and Kent County had 4 youth. Estimating on the high side, there were likely not more than 100 juvenile competency cases statewide. This number represents less than 1% of the 40,000 new filings in delinquency court each year.

These numbers are fairly comparable to the state of Virginia, which has the most notable juvenile competency standard in the country. When they started in 2002, they had approximately 92 youth in their restoration program; over the course of ten years, their program peaked around 143 youth and then declined again.

The most interesting finding of Virginia's program is that an average of 72% of youth were able to be restored and return to court to face their charges. So this should not be viewed as a way to avoid prosecution or get kids "off the hook."

Finally, this legislation tries to address the question, "What do we do with a child who is incompetent but needs services?" We cannot prosecute a child who is incompetent but currently the courts can only provide treatment to youth who have been adjudicated of a crime. These bills would allow, in a limited way, for the court to order a youth who has a serious emotional disturbance to receive community mental health treatment for up to 60 days, with a potential 60 day extension. This basically provides enough time for the youth to receive an assessment and for the mental health agency to work with the family to determine an initial treatment plan. I recently met with a director of the local community mental health agency who assured me that if a youth enters with a serious emotional disturbance then they are required to serve that child.

Please remember that competency issues will continue to be raised, regardless of whether standards are sufficiently in place to address this Constitutional right. These bills will finally provide much needed clarity to the courts and to the families who watch their children go through these systems. It is imperative that we enact this legislation as soon as possible so that incompetent children are not left to linger in detention or unwittingly face adjudication.

Respectfully submitted,



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May 15, 2012

Michigan Council on Crime and Delinquency  
C/O Michelle Weemhoff  
1000 West St. Joseph Suite 400  
Lansing, MI 48915

Dear Michelle:

Per your request, I am providing a brief summary of the services my colleague Dr. Grisso and I have provided regarding juveniles' competence to stand trial. I have also included a sample one-day training agenda.

The type and range of consultation that we perform for states or organizations varies depending upon the needs of a particular state or jurisdiction. However, generally, it may be divided into consultation related to juvenile competence to stand trial (JCST) legislative development and implementation, and consultation related to assessment/clinical services.

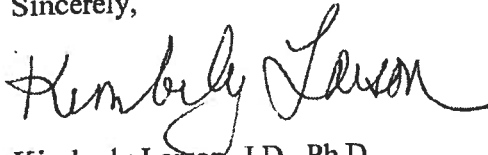
We often assist states in beginning their legislative efforts by providing consultation regarding the key issues they will likely have to resolve in creating a new statute in this area. We help states when they have encountered a legislative issue they have been unable to resolve. At times we also provide consultation and testimony for legislatures on proposed juvenile competence bills. This work is largely based upon our recently released guide, which is a free resource available at <http://modelsforchange.net/publications/330>. When states are looking to implement new legislation we may also provide guidance regarding options to arrange systems including forensic services, evaluations, or remediation.

Other consultation has focused on training personnel regarding clinical issues and assessment of JCST. This latter type of work is designed to train individuals to conduct JCST evaluations (e.g., for clinicians) or to become good consumers of such evaluations (e.g., for attorneys, judges). The content of such trainings vary depending upon the audience and the training needs of the jurisdiction. The length of the trainings vary from a few hours to a few days, again, based upon the jurisdiction's goals and depth of training required. Assessment related programs are guided by Dr. Grisso's book *Evaluating Juveniles' Adjudicative Competence*, commonly known as the JACI. The JACI is a structured interview guide for the assessment of juveniles' competence. You can read further about the JACI at <http://www.prpress.com/books/ejc.html>.

From our discussions, my understanding of the goals for Michigan's proposed session would be to familiarize clinicians that already have juvenile forensic experience with the new statute and provide them with skills for assessing juveniles' competence to stand trial. Based upon the information I have received thus far, I have created a sample agenda (attached below). This is meant to provide a general idea of the content for a single day training (e.g., if your audience were expanded to include less experienced clinicians or other professionals adaptation of content and/or focus would be needed). If we were to assist you in this project, we would want to work with your group to adapt the training to fit your statute and procedures (e.g., through contact with local stakeholders). We might also consider discussions of broader issues such as sustainability of the training beyond our visit.

I hope that this information will assist you in your legislative process and in informing your decisions regarding your development of a juvenile competence training program. It has been a pleasure working with you on juvenile competence related issues over the past several years, and I look forward to a continued productive relationship.

Sincerely,

A handwritten signature in black ink, reading "Kimberly Larson". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Kimberly Larson, J.D., Ph.D.  
Assistant Professor, Psychiatry  
UMass Medical School

# SAMPLE AGENDA

## **Juvenile Competence to Stand Trial Assessment: Implementing Michigan's Recently Passed Legislation**

**2012 (Exact Date TBD)**

**9:00 a.m. – 5:00 p.m.**

Conducted by: Kimberly Larson, J.D., Ph.D.

**Purpose:** This full-day session will aid clinicians in understanding the concept of competence to stand trial, how it is applied to juveniles, current research regarding juvenile development & juveniles' capacities as they related to competence to stand trial. This session will then review the process for conducting juvenile competence evaluations that is becoming standard nationally and allow the clinicians to ask questions about the evaluation process.

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### **9:00 a.m. – 9:30 a.m.      Introduction**

Welcome

Introductory Comments/Review of Schedule for the Day

*Kimberly Larson*

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### **9:30 a.m. – 10:30      Background: Laying the Foundations**

1. Brief History of JCST
  2. Competence to Stand Trial: Review of Legal Concepts
  3. Review of Michigan's new JCST laws/procedures
  4. Developmental Concepts / Research: How Are Kids Different?
    - Cognitive Development
    - Psychosocial Development (e.g., Risk perception; Impulsivity, Future Orientation; Peer Influence)
  5. A Developmental Perspective on Juveniles Competence-Related Abilities/Capacities
    - Implications of developmental differences for JCST
    - Research on Juveniles' Competence to
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Stand Trial

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**10:30 – 12:00 p.m.**

**Assessing Juveniles' Competence**

1. Raising the Question
  - When should JCST be raised
  - Who should evaluate
  - What is the examiner's role
2. Determining the Scope of the Evaluation
  - What questions should the evaluation answer
  - What types of data will be needed to answer those questions
3. Preparing for the Interview
  - Role of the attorney
  - Role of parents/guardians/caretakers
  - Clarifying the Limits of Confidentiality

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**12:00-1:00**

**Lunch**

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**1:00-4:00**

**Assessing Juveniles' Competence (cont'd)**

4. Data Collection
    - Record Review
    - Clinical /Developmental Interview
    - Interview to Assess CST Related Abilities/Capacities
    - Psychological testing
    - Collateral Interviews
  5. Interpreting the Data
    - Clinical / Forensic Data
    - Opinions & Recommendations
  6. Writing the Report
    - Sections Commonly Included in JCST Evaluations / Suggestions for Organizing Information
    - Review of Example Case Report
    - Dealing with Questions Related to Remediation: What do we know
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# Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers

**Kimberly Larson, Ph.D., J.D.**

**Thomas Grisso, Ph.D.**

**National Youth Screening & Assessment Project**

**ModelsforChange**  
Systems Reform in Juvenile Justice

## C. Qualifications of the Examiner

### The Component

*The statute should offer specific requirements for the qualifications of mental health examiners who will be authorized to perform court-ordered evaluations of juveniles' competence to stand trial.*

The court's need for accurate and relevant information requires that examiners who perform mental health evaluations understand the legal definitions and requirements associated with competence to stand trial ("forensic expertise"). It also requires that they possess the professional expertise to perform psychiatric or psychological clinical evaluations ("clinical expertise") with children and adolescents.

The mere fact of psychiatric or psychological training in no way assures that a professional knows how competence to stand trial is defined, unless the professional has had special forensic training or experience beyond his or her general clinical training. Similarly, the professional organizations of psychiatrists and psychologists do not presume that all of those professionals are qualified to perform evaluations of children and adolescents. They require specialized training or experience<sup>117</sup> specifically in the assessment and treatment of children and adolescents.

It can be argued that courts should make similar distinctions when identifying professionals who are qualified to perform forensic evaluations of juveniles relevant for competence to stand trial. While formulating the codification of clinicians' qualifications for this purpose, lawmakers must also consider the likelihood that specialists with those qualifications will actually be available to the court. The more stringent a jurisdiction's requirements regarding qualifications, the more difficult it might be to find experts with those qualifications.

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117 The most common requirement used in mental health professional specialty regulations refers to "training or experience" in the specialty. This recognizes that graduate or medical school preparation are not the only ways to obtain the necessary expertise. Many child forensic experts have obtained their qualifications through post-degree experience, continuing education and/or supervision by other specialty experts.

## The Options

### *Mental Health Examiners Should Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles*

Proponents of this view would argue that, without specialized training or experience, mental health professionals are unqualified to conduct these evaluations. Requiring only that the examiners be licensed mental health professionals does not guarantee that they have had experience or training in working with children and adolescents, nor that they understand the applicable legal standard.

Even within psychology and psychiatry, professionals do not consider themselves competent to work with children or adolescents unless they have been trained to do so.<sup>118</sup> Working with such populations without the proper training would be considered unethical. Thus, we cannot consider forensic evaluators who have only had experience working with adults to be able to competently assess juveniles in a forensic context.

#### Example Statutory Language:

#### *Mental Health Examiners Should Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles*

A competency evaluation shall be conducted by a licensed psychiatrist or licensed psychologist who is experienced in the clinical evaluation of juveniles and trained in forensic competency assessments, or a psychiatrist or psychologist who is in forensic training and under the supervision of a licensed forensic psychiatrist or licensed psychologist with expertise in forensic psychology.

COLO. REV. STAT. § 19-2-1302(4)(b) (2011).

"Qualified examiner" means a licensed psychologist or psychiatrist who has expertise in child development and has received training in forensic evaluation procedures through formal instruction, professional supervision, or both.

GA. CODE ANN. § 15-11-151(9) (2011).

Similarly, many psychologists and psychiatrists who are trained to work with children and adolescents are not trained to perform forensic evaluations. They would not be knowledgeable regarding how to conduct an evaluation of competence to stand trial and the types of abilities a defendant would need in order to be able to meet the *Dusky* standard.

118 AM. PSYCHOLOG. ASS'N, CODE OF ETHICS (2003). See also Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 L. & HUM. BEHAV. 655 (1991).

*Mental Health Examiners Should Not Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles*

Proponents for this view would argue that imposing too many requirements would create too small a pool of possible examiners. Some states, especially those encompassing rural areas, do not have specialized mental health professionals, especially examiners with both forensic and child specializations. Stringent requirements would reduce the availability of examiners, which in turn could reduce the legal system's attention to the question of juveniles' competence.

States contemplating taking this position would need to consider the risk that clinicians may practice outside the bounds of their professional ethics, as well as the risk of inadequate legal protections for juveniles in delinquency proceedings.

**Example Statutory Language:**

*Mental Health Examiners Should Not Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles*

The court shall stay all proceedings and appoint at least one (1) examiner who shall be a qualified psychiatrist or licensed psychologist, or shall order the department of health and welfare to designate, within two (2) business days, at least one (1) examiner who shall be a qualified psychiatrist or licensed psychologist, to examine and report upon the mental condition of the juvenile.

IDAHO CODE ANN. § 20-519A (2011).

**Recommendation:** *Qualifications of the Examiner*

We recommend that states should require at least a minimum level of training and/or experience in the area of child clinical psychology or psychiatry and in forensic practice. Psychologists or psychiatrists should practice only in areas in which they have had sufficient training.<sup>119</sup>

We recognize that in some states, such criteria could result in a lack of qualified examiners. As a remedy, we suggest that many communities will have child developmental professionals who can be provided continuing education opportunities that will allow them to understand the legal concept of competence to stand trial. A large number of states and communities have required continuing education programs for professionals who provide the courts with forensic evaluations.<sup>120</sup> Some of these states also require an examination that demonstrates a minimum level of competency or ongoing review of sample reports to ensure adequacy of reports.

119 AM. PSYCHOLOG. ASS'N, CODE OF ETHICS (2003). AM. PSYCHIATRIC ASS'N CODE OF MEDICAL ETHICS WITH SPECIAL ANNOTATIONS FOR PSYCHIATRY (2009 Ed. Revised). See also Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 L. & HUM. BEHAV. 655 (1991).

120 See e.g., Robert Fein, Kenneth Appelbaum, Richard Barnum, Prudence Baxter, Thomas Grisso & Naomi Leavitt, *The Designated Forensic Professional Program: A State Government-university Partnership to Improve Forensic Mental Health Services*, 18 J. OF MENTAL HEALTH ADMIN. 223-30 (1991) (outlining the creation of one program for continuing education in forensic services). See also, Richard Redding & Lynda Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353-409 (2001).